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No. 73-657

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

BUDDY LLOYD COX, RONALD B. HEATON, and CHESTER W. PALMER, PETITIONERS

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1273, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

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No.

BUDDY LLOYD COX, RONALD B. HEATON, and CHESTER W. PALMER, PETITIONERS

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1273, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of veterans Buddy Lloyd Cox, Ronald B. Heaton, and Chester W. Palmer, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The *per curiam* opinion of the court of appeals (App. A, *infra*) is reported at 476 F. 2d 1287. The opinion of the district court (App. C, *infra*) is reported at 343 F. Supp. 1292.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on May 18, 1973. On August 20, 1973, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including October 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether beginner or probationary employees, who have not completed the minimum hours of employment necessary to attain initial seniority as of the time they are drafted into military service, occupy positions "other than temporary" for purposes of securing veterans' reemployment rights under the Selective Service Act.

2. Whether, for purposes of obtaining equivalent seniority credit upon reemployment, the "reasonable certainty" of a veteran's continued civilian employment (had he not been drafted) should be determined solely on the basis of the average performance of the entire class of workers without seniority status (including part-time and transient as well as full-time workers), even though his own past performance shows a reasonable certainty that he would have attained seniority.

STATUTES INVOLVED

Section 9 of the Military Selective Service Act of 1967, as amended, 50 U.S.C. App. 459, provides in pertinent part:

(b) *Reemployment rights.*

In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who * * * makes application for reemployment within ninety days after he is relieved from such training and service * * *—

* * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer * * * to such position or to a position of like seniority, status, and pay; * * *

* * * *

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so [.]

* * * *

(c) *Service considered as furlough or leave of absence.*

(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces [and], shall be so restored without loss of seniority * * *.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) of this section should be so restored in such manner

as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

* * * *

STATEMENT

This is an action by three honorably discharged veterans to enforce their reemployment seniority rights under Section 9 of the Military Selective Service Act of 1967, as amended, 50 U.S.C. App. 459. The Department of Justice represents such veterans pursuant to 50 U.S.C. App. 459(d).

Petitioner Cox was graduated from high school on June 5, 1965, and worked full time as a longshoreman in the Port of Houston, under the auspices of the respondent union, for the eight-month period from June 8, 1965 to February 16, 1966, when he was inducted into the armed forces. He also had worked part-time as a longshoreman before his graduation from high school (App. C, *infra*, pp. 4a-6a). He worked 688.5 hours from October 1, 1964 to September 30, 1965, and 714.5 hours from October 1, 1965 to February 16, 1966 (App. C, *infra*, p. 6a). During the latter period[1] he thus averaged more than 37

[1] The record does not divide the 688 hours for the 1964-1965 fiscal year between the part-time work before his graduation from high school and the full-time work thereafter. During the 1963-1964 fiscal year (when he was still in high school), he worked 264.51 hours (App. C, *infra*, p. 6a).

hours per week, or a rate in excess of 1900 hours per year. He did not complete the 1200 hours necessary to attain seniority (see pp. 5-6, *infra*) during the fiscal year ending September 30, 1965, because, being still in high school, he worked only part-time for most of this period. Nor did he complete 1200 hours for the fiscal year ending September 30, 1966, because he was drafted in February of that year.

Petitioners Heaton and Palmer had similar work records as longshoremen in the Port of Houston prior to being drafted in February and March 1966, respectively. In the period from October 1, 1965, to February 21, 1966 (when they stopped working because of the draft), they respectively worked at a rate equivalent to 32.3 and 35.4 hours per week, or more than 1670 and 1840 hours per year (see App. C, *infra*, pp. 5a-6a).[2] Like Cox, neither attained the 1200 hours necessary for initial seniority during the specific fiscal years ending September 30, 1965, or September 30, 1966.

A longshoreman who has not attained initial seniority (whether a beginner, moonlighter, casual, transient, or sporadic worker) and who works at least 1200 hours during any fiscal year ending September 30[3] is thereafter entitled under respondent union's hiring rules to initial hiring seniority ("D-1" classi-

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[2] These rates are based on working 646.75 and 708 hours, respectively, for the 20-week period from October 1, 1965 to February 21, 1966 (App. C, *infra*, p. 6a; R. 209).

[3] 1200 hours per year is about 3 working days per week. The reason for the 1200-hour requirement is to discourage sporadic workers (App. C, *infra*, p. 10a), not beginners.

fication) over all longshoremen who have not attained such status ("D" classification) (App. C, *infra*, pp. 8a-10a). None of the petitioners attained initial hiring seniority by the time they were drafted, not having worked 1200 hours during a specific fiscal year. However, they apparently presented themselves at the union's hiring hall on a regular basis during the period after graduation and before induction, and in fact were hired for most of the working days during this period (see pp. 4-5, nn. 1-2, *supra*). They were full-time employees in fact, although they were in the lowest classification for hiring purposes.

Petitioner Cox was discharged from the armed forces on January 27, 1968. He was reemployed as a longshoreman through the respondent union on February 1, 1968. However, when he sought a seniority classification based on continued employment of at least 1200 hours each year while in the armed forces (which would have meant a "C" classification as of March 1968, or hiring seniority over both "D-1" and "D" longshoremen), this was denied by the union. Cox was again assigned to the lowest or "D" classification. Petitioners Heaton and Palmer were treated similarly upon their discharge from the armed forces (App. C, *infra*, pp. 5a-6a; R. 208-209, ¶ 10, 13, 16).

After his reemployment in February 1968 in the lowest classification, Cox worked more than the necessary 1200 hours in the remaining eight months of the fiscal year, although fewer hours than he would have worked with a "C" classification. He obtained

initial hiring seniority ("D-1") as of September 30, 1968, and the next higher seniority step ("C") one year later. Petitioner Palmer also worked more than 1200 hours in each fiscal year after his reemployment. Petitioner Heaton did not. (See App. C, *infra*, p. 6a).

On September 12, 1969, the United States Attorney filed a complaint against the respondent union (which is responsible for petitioners' seniority status, hence hiring availability) and the West Gulf Maritime Association (made up of the stevedore companies who employed petitioners). The complaint alleged that petitioners were entitled to full credit for seniority purposes for their time worked before entering into the armed services and for their time spent on active duty, and demanded compensation for loss of wages suffered by reason of their not obtaining the seniority status to which they were entitled.

The respondents urged two alternative defenses. First, since petitioners had not attained the initial seniority classification ("D-1") by the time they were drafted, and were in the lowest hiring classification ("D"), they did not occupy positions "other than temporary," and hence were not entitled to *any* reemployment rights under the Selective Service Act. Second, assuming they were covered employees under the Act, there was no certainty that the Class D employees, as a group, would obtain 1200 hours of employment and advance to Class D-1 (since only a small percentage did so in each fiscal year); hence petitioners were not entitled to seniority credit.

The district court upheld both of these contentions. The court first held that petitioners did not occupy "other than a temporary position," stating (App. C, *infra*, p. 16a):

> As casual longshore laborers who worked only when the regular longshoremen could not fill all of the gangs needed, they could not reasonably expect that their employment would be continuous and for the indefinite future. The policy behind this "other than temporary" exception is consistent with this disposition, since plaintiffs as occupants of temporary positions clearly would have been deprived of their employment as casuals, even if they had not been called to military service.

Alternatively, the district court held that the petitioners were not entitled to seniority credit under the "escalator principle" of Section 9(c)(2) of the Act since, despite petitioners' own work records prior to being drafted, "there is simply no reasonable certainty that casuals [*i.e.*, "D" class longshoremen] as a group will attain seniority status. In fact, in 1968, * * * only four percent of the casuals actually made this advancement" (App. C, *infra*, p. 20a).

The court of appeals affirmed *per curiam*, adopting the opinion of the district court (App. A, *infra*).

REASONS FOR GRANTING THE WRIT

This case raises important questions under the Military Selective Service Act of 1967, 50 U.S.C. App. 459. That Act carries forward the reemployment pro-

visions of earlier draft laws enacted to ensure that a person inducted into the Armed Forces would not be disadvantaged in the pursuit of his civilian career as a result of his military service. The decision below severely limits the reemployment rights of veterans in industries where work opportunity depends on time-on-job seniority. In our view, the alternative holdings below that veterans who have not attained the initial seniority ranking by the time they are drafted are neither employees under the Act entitled to reemployment rights, nor employees entitled to seniority credit for time spent in the service, misinterpret the Act in a manner seriously inconsistent with the basic statutory purpose to protect the civilian pursuits of young men called to serve their country.

1. The courts below specifically held that beginner employees who have attained initial seniority before being drafted come within the statutory exception relating to "temporary" positions, and hence have no reemployment rights at all under the Act. This ruling would deprive many returning veterans of reemployment rights, for the draft has taken many young men who have commenced permanent jobs in longshoring, construction and similar industries, but who have not worked long enough on the job to have obtained initial seniority by the time they are drafted. The problem is particularly acute at this time because of the large number of veterans currently being discharged from military service. While seniority is important in these industries to increase the

chance of work during slack periods or for reducing the risk of lay-offs, we submit that it has no bearing on the permanent or temporary nature of the position itself, for purposes of reemployment rights under the Selective Service Act.

Section 9(b) of the Act affords a statutory reemployment right to a veteran who "leaves a position (other than a temporary position)." In our view, the "position" referred to is the job opportunity itself, here longshoring, which is not a merely temporary opportunity. If the work opportunity has no fixed termination date, and can be indefinite in duration, or permanent, the position, in our contention, is one which is "other than temporary." This is the interpretation that comports with this Court's previously stated view that Congress did not intend that veterans would be without reemployment rights merely because they were still in the probationary stage of employment when drafted, notwithstanding that, during such time, continuity of employment may depend upon the "balance between supply and demand" in the labor market. *Brooks* v. *Missouri Pac. R. Co.*, 376 U.S. 182, 185.

Indeed, that Congress, in using the term "temporary," intended to except only very short-term positions is shown by the following Senate colloquy on a floor amendment which repeated the exception (86 Cong. Rec. 11030):[4]

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[4] Veterans' reemployment rights were first provided for in Section 8(b) of the Selective Service and Training Act of 1940, 54 Stat. 885, 890. See 86 Cong. Rec. 10125; S. 4164, 76th Cong., 3d Sess.

> MR. DANAHER: Suppose a man is hired to pick corn in Virginia, and the corn-picking job expires within a week, and then he is told there is no more work. Or suppose he is hired to pick apples in Connecticut in September, and after the apples are picked he is told there is no more work. [Would he be covered?]
>
> MR. PEPPER: No; * * * The amendment says "other than a temporary position." The positions which the Senator has described are all temporary positions, so the amendment would not affect that type of employment.

Thus the word "temporary" was used to relieve an employer, hiring transient labor to fill a temporary need, from the responsibility of converting that temporary need into a binding job classification in the event that the transient laborer was drafted and then, upon his release, sought reemployment. Here, petitioners were regular beginning longshoremen, working at a rate sufficient to qualify for seniority, when they were drafted.

In contrast to the court below, several other courts of appeals have agreed with our contention that the exception relating to "temporary" positions is to be narrowly construed, and relates to the temporary or short-term nature of the position itself. See, *e.g.*, *Trusteed Funds, Inc.* v. *Dacey*, 160 F. 2d 413, 418 (C.A. 1) ("extra clerk hired during the holiday rush" or a "substitute employee hired during the absence of a regular employee"); *Martin* v. *Roosevelt Hospital*, 426 F. 2d 155 (C.A. 2) (intern position held not temporary); *Brickner* v. *Johnson Motors*,

425 F. 2d 75 (C.A. 7) (initial probationary position held not temporary); *Spearmon* v. *Thompson*, 167 F. 2d 626, 629-30 (C.A. 8) (temporary position means job created to fill a transitory, temporary need).

Indeed, the *Brickner* case, *supra*, dealt specifically with the question whether beginning probationary employees, as a group, occupy "temporary" positions, and conflicts in principle with the decision below. There the Seventh Circuit held that a beginner or probationary employee must satisfy two tests in order to occupy an "other than temporary" position. First, is the nature of the position itself permanent or temporary? Second, would the employee have received permanent status upon his completion of the probationary period? 425 F. 2d at 76-77. Here both tests are satisfied, for longshoring work is permanent, and the respondents concede that beginning employees would receive "permanent" status upon completion of 1200 hours in any fiscal year.[5] The Seventh Circuit made it clear, in regard to the second test, that "[t]he inquiry [for this aspect of the case] is *not* whether the employee would complete the probationary period but upon completion whether the employee would receive permanent status." 425 F. 2d at 77 (emphasis added).

The court below, however, has added an additional test to the permanent/temporary question—a test which does look to the reasonable expectancy that the

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[5] Court of appeals brief for respondent International Longshoremen's Association, Local 1273, p. 9.

employee would complete the probationary period.[6] In using this test, which in our view is properly applicable only to the question of seniority credit, to govern the initial question of employee coverage under the Act, the court here has adopted a rule inconsistent with the rule applied by the Seventh Circuit.

This conflict in circuits on the meaning of "temporary" positions, as applied to beginning or probationary employees lacking seniority rating, is important to the administration of the Act and should be resolved by this Court.

2. The alternative holding of the courts below raises an additional question. If, as we contend, petitioners and other similarly situated veterans held positions "other than temporary" and thus are entitled to the Act's reemployment and seniority rights, is the "reasonable certainty" of their continued employment (had they remained on the job), for purposes of obtaining equivalent seniority credit upon their reemployment (see *Tilton* v. *Missouri Pac. R. Co.*, 376 U.S. 169, 180), to be determined solely on the

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[6] The district court specifically relied on the proposition that Class D men worked "only when the regular longshoremen could not fill all of the gangs needed", and thus could not expect continued employment (App. C, *infra*, p. 16a). However, the record shows that Class D men in fact performed a large portion of the work available (31%, or over 700,000 man hours in FY 1969; R. 214-215) and were an integral part of the work force of the Port of Houston. Thus, there was a reasonable expectation that sufficient work would be available for any conscientious, willing, beginning longshoremen, which petitioners had already proved themselves to be by the time they were drafted.

basis of the average performance of all those without seniority, or may they rely on their own individual performance records prior to being drafted. The courts below ignored the impressive individual work records of the petitioners and denied them seniority on the ground that most of those in the lowest class, *as a group* (including sporadic workers and moonlighters), do not attain initial seniority. This view of the "reasonable certainty" rule would deprive any veteran returning to seniority hiring preference industries of the seniority which he himself could with reasonable certainty have expected, simply because others in his classification did not make the grade. This holding, we contend, seriously misapplies the *Tilton* principle. Because of the importance of that principle in the administration of the Act, review by this Court is also warranted on this question.

A returning veteran is entitled, upon his reemployment, not only to the same position he occupied when drafted, without loss of seniority, but also to "such status * * * as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." 50 U.S.C. App. 459(c)(2). This "escalator principle" of seniority credit guarantees that an employee called away to serve his country will not mark time while in the military, but will advance up those steps of the seniority ladder which are an incident of continuous civilian employment. See *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 270-271.

The problem inherent in the escalator principle is to distinguish between those seniority steps which are basically routine in nature, and those which accrue primarily by vitrue of management discretion. A returning veteran is entitled to the former, but not the latter. In *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, the Court remanded a veteran's seniority claim for consideration of the veteran's allegation that in actual practice advancement to a more senior step was not discretionary, but "automatic." In *Tilton* v. *Missouri Pac. R. Co.*, 376 U.S. 169, 180, the Court qualified *McKinney*, holding that there was no intention to require absolute foreseeability of automatic advancement. Rather, a returning veteran is entitled to seniority credit "if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur." 376 U.S. at 181.

Here, as a matter of hindsight, the advancement occurred (at least in the cases of petitioners Cox and Palmer). The question is whether it was "reasonably certain," prior to induction, that it would have occurred in circumstances where advancement depended only on working a minimum number of hours in each fiscal year. That question can accurately be answered only if due regard is given to the factual context in which it arises.

In the present case the "D" classification of workers, those who have not attained an initial seniority ranking, is in fact composed of a number of dif-

ferent kinds of workers. Some of these workers may be transients, derelicts, or others whose attachment to the Houston labor force is very tenuous. In fiscal 1970, 80 percent of all men who failed to work 1200 hours actually worked less than 200 hours (one day every 2 weeks) and would probably fall into this class (R. 224). Another group of workers would be students, such as the petitioners before graduation, who may work regularly on weekends or during the summer, but have no expectation of accumulating 1200 hours in a given year. Yet another class would be moonlighters who may work regularly a few hours per week in addition to one or more other jobs, but who again have little chance of accumulating 1200 hours. Finally, there is the class of full-time beginning longshoremen, to which petitioners belonged at the time of their induction.

All of these men had a Class D hiring preference, and they are all referred to by the respondents and the opinion below as "casual" workers. But it is clear that petitioners' prospects were not the same as the average of Class D workers, and their statutory rights should not be denied on the basis of that average. There was, on this record, a "reasonable certainty" that persons situated similarly to petitioners, who consistently appeared for work full time, would be able to attain the requisite 1200 hours. Indeed, each of the petitioners here worked at a rate well in excess of 1200 hours per year (which is only 3 days per week) for a significant period prior to being drafted. Judged by all relevant factors, including

their own past performance, it was reasonably certain that they themselves would have advanced.[7] The courts below erred, therefore, in denying petitioners their statutory right to the seniority credit which, with reasonable certainty, they would have accrued but for being drafted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1973.

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[7] This of course is a fact question, which, if seriously disputed by respondents, should be determined on remand by application of the correct legal standards. It is the test applied by the courts below ("reasonable certainty that casuals *as a group* will attain seniority status," see App. C, *infra*, p. 20a, emphasis added) which we dispute.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 72-3194

BUDDY LLOYD COX ET AL., PLAINTIFFS-APPELLANTS

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; LOCAL 1273, ET AL., DEFENDANTS-APPELLEES

May 18, 1973

Appeal from the United States District Court for the Southern District of Texas; Carl O. Bue, Jr., Judge.

Anthony J. P. Farris, U. S. Atty., James G. Gough, Wayne H. Paris, Asst. U. S. Attys., Houston, Tex., Walter H. Fleischer, Thomas J. Press, Morton Hollander, Attys., Dept. of Justice, Washington, D. C., for plaintiffs-appellants.

Chris Dixie, Robert Eikel, Houston, Tex., for defendants-appellees.

Before WISDOM, DYER and INGRAHAM, Circuit Judges.

PER CURIAM:

We are in agreement with the well reasoned opinion of the district court, Cox, et al. v. International Longshoremen's Association, Local 1273, et al., 343 F. Supp. 1292 (S.D.Tex., 1972), and its judgment is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1972

No. 72-3194

D. C. Docket No. CA 69-H-886

BUDDY LLOYD COX ET AL., PLAINTIFFS-APPELLANTS

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; LOCAL 1273, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Southern District of Texas

Before WISDOM, DYER and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

May 18, 1973

Issued as Mandate:

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civ. A. No. 69-H-868

BUDDY LLOYD COX ET AL., PLAINTIFFS

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1273, ET AL., DEFENDANTS

May 26, 1972

MEMORANDUM OPINION

CARL O. BUE, JR., District Judge.

This is an action which was tried to the Court. Plaintiffs as veterans seek advancement in seniority as longshoremen and the recovery of back wages of which they were allegedly deprived as a result of the refusal of their alleged employers, International Longshoremen's Association, Local 1273 (Local 1273) and thirty stevedore companies, to grant credit for their time spent in the Armed Forces toward job seniority status pursuant to the Universal Military Training and Service Act, 50 U.S.C. App. § 459.

The facts necessary for decision are essentially undisputed. Plaintiff Cox began working periodically as a longshoreman through Local 1273 in 1963 while still in high school. After completion of his high school education in June of 1965, he continued to

work intermittently as a longshore laborer until February 16, 1966, when he was inducted into the United States Army. On February 1, 1968, he returned to longshore work after having received an honorable discharge from the Armed Forces. Plaintiff Heaton similarly worked as a longshoreman through Local 1273 while completing his high school education and thereafter periodically until inducted into the United States Marine Corps on February 21, 1966. On June 24, 1968, he returned to perform a relatively nominal amount of longshore work while, anomalously, waiting for an honorable medical discharge from the Armed Forces. Plaintiff Palmer began longshore work through Local 1273 in 1964 and worked intermittently until inducted into the United States Marine Corps on March 8, 1966. Following receipt of an honorable discharge, he returned to longshore work on March 22, 1968. After returning to this civilian employment at the Houston waterfront, two of the plaintiffs, Cox and Palmer, worked 1,200 hours in a fiscal year and were advanced from an unclassified or probationary type status, generally referred to as Class D, to seniority status designated as Class D-1. However, seniority credit for time spent in military service was not granted to those two plaintiffs, as well as plaintiff Heaton, since they did not work 1,200 hours in the fiscal year prior to their induction pursuant to the union's hiring hall rules.[1]

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[1] The following chart indicates the total number of hours worked by each plaintiff as well as their seniority classification

for each fiscal year (September 30 to October 1) from 1963 through 1970:

For the year ending 9-30-63:

Cox	92.75	hours—D
Heaton	63.50	hours—D
Palmer	-0-	hours—D

For the year ending 9-30-64:

Cox	264.51	hours—D
Heaton	2.50	hours—D
Palmer	430.50	hours—D

For the year ending 9-30-65:

Cox	688.50	hours—D
Heaton	499.50	hours—D
Palmer	647.25	hours—D

For the year ending 9-30-66:

Cox	714.50	hours—D
Heaton	646.75	hours—D
Palmer	708.00	hours—D

For the year ending 9-30-67:

Cox	-0-	hours—D
Heaton	-0-	hours—D
Palmer	42.00	hours—D

For the year ending 9-30-68:

Cox	1310.25	hours—D-1
Heaton	295.50	hours—D
Palmer	1210.50	hours—D-1

For the year ending 9-30-69:

Cox	1217.00	hours—C
Heaton	31.00	hours—D
Palmer	1341.00	hours—C

For the year ending 9-30-70:

Cox	832.00	hours—C (includes compensation time)
Heaton	3.00	hours—D
Palmer	1719.00	hours—C

Although plaintiff Heaton remains in the suit as a party, it is apparent that the controlling circumstances on which the legal issues turn in this litigation are found only in the actions of Cox and Palmer.

In order to view in proper context the various contentions of the respective parties, it is important at this point to describe in some detail the system of allocation of work employed at the Port of Houston under which the stevedore companies employ longshoremen to load and unload vessels; it is also important to underscore the role played by the longshore union in this work context at the times material to this lawsuit. It is undisputed that this system is basically unique in the industry, the Court being apprised that there is no precisely parallel procedure employed in any other major American port.

The available work involving the loading and unloading of vessels at the Port of Houston is divided equally between defendant union, Local 1273 and another longshore union, Local 872. Local 1273 has a collective bargaining agreement with a representative association of the thirty defendant stevedore companies. Pursuant to this agreement, Local 1273 operates an exclusive hiring hall for the referral of longshoremen to the various stevedore companies requiring longshore labor in the Port of Houston.

Substantially all stevedore work in this port is performed by longshoremen who are referred through one of the two local unions. These stevedore companies, which are in direct competition with one an-

other, present orders for gangs to the unions as they need longshoremen to load or unload vessels. The need for gangs by a particular company fluctuates considerably during the work year. Although vessels are constantly arriving at and departing from the Port of Houston, a particular stevedore company may or may not have a contract or contracts to perform stevedoring services for the vessels actually in port at a given time. In order to simplify an otherwise unmanageable record keeping process, the local unions and stevedore companies maintain one central system for keeping the payroll and seniority records of longshoremen.

The seniority procedures employed by Local 1273 determine the selection of longshoremen for referral to the various stevedores. The guiding principle is that a longshoreman must work 1,200 hours in a given fiscal year in order to receive seniority credit for that year. If the longshoreman does not work the required 1,200 hours per year, he loses one seniority year as a penalty. These laborers are classified by the union in conformity with their years of seniority as follows:

CLASS	YEARS OF EMPLOYMENT
Gold Star	25
AAA	20
AA	15
A	10
B	5
C	2
D-1	1
D (unclassified or casual)	less than 1

The hiring hall procedure requires gang foremen, who are selected by the unions, to choose their work gangs from the men according to seniority down to and including the casuals or D classified men, all of whom are divided into their respective classes at the time of selection in the hiring hall. Under this system any particular D classified man or casual may or may not be offered employment on a given day. His chance of a job depends on the number of higher classified men present at the hiring hall, the number of gangs needed for the available work and the preference expressed by the gang foremen in selecting members of their work gangs from the longshoremen on hand.

It is essential to recognize that under this system of employment anyone can enter the hiring hall, position himself in the section for casuals in the hall and instantly be theoretically eligible for selection to work in a gang. No employment application need be made to the union or to the stevedore companies to work as a casual longshoreman. In the event a casual is selected for work by a gang foreman, he then reports to the stevedore company at shipside to work the particular vessel which the stevedore has contracted to load or unload. The stevedore company may reject at shipside, and thus refuse to employ, any man sent to work for them by the union where proper cause can be shown. Once accepted, the longshoreman then becomes the employee of that particular stevedore company for the duration of that particular job. Until a casual has worked 1,200 hours in one classifica-

tion year so as to earn and advance to a D-1 classification, he is in direct competition for selection to a gang with all other casuals, regardless of the number of hours under 1,200 previously worked. Since all longshoremen receive the same basic rate of compensation, the sole advantage in holding a higher classification is the seniority status which carries with it the preferential right to be selected more often to work the ships and thus to work more hours and earn more money.

The purpose of the 1,200 hour rule is obvious. It is to induce regular career longshoremen, those who rely primarily on longshore work as a means of making a living, to work more hours per year and thus to minimize the number of participating casual workers. The casuals whose attendance at the docks is much more sporadic than that of the career longshoremen have been afflicted to a much greater degree with problems of inefficiency, inexperience, injuries and instability in the work force. The general feeling is that if a man does not average three days of work per week, he is not a regularly employed longshoreman and, therefore, should be discouraged from longshore work. As a matter of interest, the impetus for this rule came not from the union or the stevedore companies, but from the United States Department of Labor which apparently took the view that decasualization of the industry was a necessity if chronic labor problems in the shipping industry were to be properly solved. Thus it was stated by the Department of Labor that the 1,200 hour rule "goes far

toward establishing a stable work force in the port." [2] Further, this governmental agency has stated that "[i]n this regard, the union has done well with the responsibility it carries for administering the hiring procedures." [3] As would be anticipated, the hiring hall rules dictate that an allowance for time spent in the military including that for advancement in seniority, is permissible only if the longshoreman in question has worked 1,200 hours in the year prior to induction.

Certain of the other casual longshoremen working through Local 1273 and accumulating comparable hours to plaintiffs during the period October 1, 1965, to September 30, 1967, were able to obtain the necessary 1,200 hours required for advancement to D-1 classification.[4] In 1968 plaintiffs Cox and

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[2] Manpower Utilization—Job Security in the Longshore Industry—Ports of Houston-Galveston (U.S. Dept. of Labor, Sept. 1964) 36.

[3] *Id.* at 41.

[4] The total number of casuals attaining D-1 classification for fiscal years 1964 through 1971 was as follows:

For Year Ending September 30	Number of Men
1964	60
1965	78
1966	120
1967	36
1968	119
1969	34
1970	34
1971	33

Palmer were classified D-1 after having worked the required 1,200 hours, and in the same year 117 other men similarly worked the necessary hours to be so classified. However, of the 3,807 men who worked through Local 1273 that year, the vast majority or approximately 2,700 were class D or casuals. Their work patterns fell short of any consistent regular employment, ranging from four hours to 1,199 hours per year, and can best be characterized as intermittent, sporadic or irregular. Indeed, some were moonlighters, working at two or three jobs at the same time.

Plaintiffs contend that the 1,200 hour qualification period which must be met before a longshoreman is allowed credit for military service toward seniority standing is not compatible with the Universal Military Training Act. Specifically, it is asserted that had they not been called to military duty, they necessarily would have advanced to D-1 classification in either 1966 or 1967 with the result that they now are entitled to a higher seniority classification. Plaintiffs contend that defendant union and defendant stevedore companies are joint employers within the meaning of the Act and that the failure of these defendants to afford seniority rights to them has resulted in monetary damages. Such damages ostensibly arise as a consequence of plaintiffs being selected for work less frequently because of their occupying a lower seniority classification. Defendants, on the other hand, strenuously urge that plaintiffs, as casual longshoremen, were only temporary employees within

the meaning of the Act at the time they were inducted into the Armed Forces and that, therefore, they were not eligible for its seniority advancement benefits. Alternatively, it is asserted by defendants that the hiring hall's 1,200 hour qualification period is not only compatible with the Act but also serves a justifiable business purpose which the Department of Labor both induced and subsequently approved.

For the purpose of providing job security to persons inducted into the Armed Forces, section 9(c)(1) of the Universal Military Training Act, 50 U.S.C. App. § 459(c)(1), provides that veterans returning from military service must be restored to their civilian employment without penalty including no loss of seniority status. The employment privileges and opportunities which were available to those who remained in civilian jobs while others entered military service were intended to be conferred upon returning veterans so that they would have equal opportunities to progress. Veterans were not to suffer employment disadvantages by reason of their having left civilian jobs to serve in the Armed Forces. However, this intention assumes that the veteran left a position with fixed employment rights vis-a-vis an employer which he could, but for his military service, normally be expected to hold for an indefinite period. The Universal Military Training Act and the many cases which have subsequently construed it make it perfectly clear that veterans upon their return to civilian jobs are not entitled to greater rights or job prospects than they would have had if they had not

entered military service. Tilton v. Missouri Pacific R. R. Co., 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed.2d 590 (1964); McKinney v. Missouri-Kansas-Texas R. R. Co., 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958); Moe v. Eastern Air Lines, Inc., 246 F.2d 215 (5th Cir. 1957), cert. denied, 357 U.S. 936, 78 S.Ct. 1380, 2 L.Ed.2d 1550 (1958); Stewart v. American Airlines, Inc., 288 F.Supp. 160 (N.D.Tex. 1968). This principle was succinctly expressed in McKinney v. Missouri-Kansas-Texas R. R. Co., *supra*, 357 U.S. at 271-272, 78 S.Ct. at 1226:

> However, § 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

Accordingly, the Act provides that anyone who held an "other than temporary position" prior to induc-

tion into the Armed Forces can sue to protect or establish his reemployment rights pursuant to this statutory provision.

In construing the Act it was early recognized that since the statute does not define the term "other than temporary position" it should be defined pursuant to common usage and given its ordinary meaning. Gualtieri v. Sperry Gyroscope Co., 67 F.Supp. 219 (E.D. N.Y. 1946); Bozar v. Central Pa. Quarry, Stripping & Constr. Co., 73 F.Supp. 803 (M.D.Pa.1947). The fact that the employment arrangement under scrutiny places the employee's position "at the will" of the employer does not transform the employment into a temporary position. Moe v. Eastern Air Lines, Inc., 246 F.2d 215 (5th Cir. 1957), cert. denied, 357 U.S. 936, 78 S.Ct. 1380, 2 L.Ed.2d 1550 (1958). In this connection it should be noted that the Act must be construed liberally to serve and implement its basic policies. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946). In ascertaining whether a position is temporary in a given employment situation, it is now well established that "the controlling determination is whether, regardless of the contract of employment, there was a reasonable expectation that the employment would be continuous and for an indefinite time." Moe v. Eastern Air Lines, Inc., *supra*, 246 F.2d at 219. *See* United States ex rel. and for Use and Benefit of Stanley v. Wimbish, 154 F.2d 773 (4th Cir. 1946); Brickner v. Johnson Motors, 425 F.2d 75 (7th Cir. 1970). The purpose of this requirement of "reasonable expectation" is to recognize that a

temporary position, one which is held only briefly with no preferential right to employment, could very well be lost anyway, even though the person involved was not called to military service. Thus, a person occupying such an employment position could not be viewed as possessing a reasonable expectation of continued employment. Moe v. Eastern Air Lines, Inc., *supra*. Nevertheless, the statutory purpose must be borne in mind at all times so that an employer is not permitted by contract, contrivance or otherwise to remove a large segment of his employees from the scope of the Act and thus evade its basic policy. Dame v. C. A. Batson Co., 157 F.Supp. 862 (D. Mass.1957). Applying the foregoing test of "reasonable expectation", it is only too apparent that plaintiffs did not occupy an "other than temporary position." As casual longshore laborers who worked only when the regular longshoremen could not fill all of the gangs needed, they could not reasonably expect that their employment would be continuous and for the indefinite future. The policy behind this "other than temporary" exception is consistent with this disposition, since plaintiffs as occupants of temporary positions clearly could have been deprived of their employment as casuals, even if they had not been called to military service.

Alternatively, even if this Court found that plaintiffs were permanent employees, they still would not be entitled to advancement in their seniority status in this instance. In Oakley v. Louisville & Nashville R. R. Co., 338 U.S. 278, 283, 70 S.Ct. 119, 122, 94 L.Ed. 87 (1949), it was aptly stated that:

> [A]n honorably discharged veteran, covered by the statute, [is] entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.

However, the application of this "escalator principle" requires satisfaction of a condition precedent in any given situation. In order to be entitled to advancement upon return from military service, the veteran must show with reasonable certainty that he would have enjoyed such advancement simply by virtue of continuous employment during his absence. Where advancement depends on the discretionary choice of the employer, a choice which was not exercised prior to departure, the veteran is not entitled to advancement upon his return from military service. McKinney v. Missouri-Kansas-Texas R. R. Co., 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958). It is clear that:

> This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur.

Tilton v. Missouri Pacific R. R. Co., 376 U.S. 169, 181, 85 S.Ct. 595, 602, 11 L.Ed.2d 590 (1964). A companion case to *Tilton* indicates that ordinary uncertainties of life cannot be used by an employer

to defeat the reasonably certain requirement and thereby deny the veteran his seniority rights. Examples of such uncertainties include the following: the fact that the particular type of work involved might not be available upon the veteran's return; the fact that the veteran's work might have been unsatisfactory if he had remained in civilian employment; or the fact that illness might have prevented the veteran's continuous employment. Brooks v. Missouri Pacific R. R. Co., 376 U.S. 182, 84 S.Ct. 578, 11 L.Ed.2d 599 (1964). However, such ordinary uncertainties are not involved in the instant lawsuit.

The intent of Congress was to provide legislation which would prevent veterans from being penalized by reason of their absence from civilian employment; it was not Congress' intent to coerce or otherwise force employers to create positions for returning veterans simply because the veteran's civilian contemporaries or successors were so advanced. The Act requires only that a returning veteran be advanced in seniority to the extent that he would have been, as a matter of right, had he not been inducted into military service. The advancement or promotion is not a matter of right if such occurrences depend upon the successful completion of conditions precedent and thus upon the discretion of the employer or upon the merit of the employee in the particular employment involved. In short, the Act provides that returning veterans must be considered as if they had been on a leave of absence. Accordingly, if promotion or advancement depends upon qualifications other than mere length of service with the employer, then the

returning veteran is not entitled to such advancement.[5]

The facts in this lawsuit make it perfectly clear that advancement from casual or D status employment to D-1 classification requires affirmative discretionary action of management. While it is true that, once a casual longshoreman accumulates 1,200 hours in a fiscal year, he is automatically entitled to a D-1 seniority classification, the attainment of 1,200 hours in a fiscal year is not simply a matter of continuous employment. The casuals or D classified men are not pre-selected, by application or otherwise, by management. The selection of casuals for any work at all is a result of a daily exercise of supervisory discretion performed by numerous gang fomemen throughout the year. Fitness, ability, agility, strength, reliability, experience, acquaintanceship and even being related to another longshoreman are some of the factors commonly given consideration by gang fore-

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[5] In sharp contrast with the facts involved in the present lawsuit in which broad affirmative discretion is exercised daily by the gang foremen in selecting personnel from a casual labor force for their respective gangs is a factual situation in which an employer exercises a discretion in the nature of a unilateral right to discharge some probationary employees. In Montgomery v. Southern Electric Steel Co., 410 F.2d 611 (5th Cir. 1969), the plaintiff-veteran was found to be entitled to retroactive seniority in employment in a steel rolling mill since it was concluded that the unilateral right of the employer to discharge employees who hold probationary type positions, even though exercised with some regularity to discharge ten percent of these employees, does not qualify as an affirmative discretionary factor accorded to management when applying promotion selection criteria to its personnel to preclude the veteran from satisfying the reasonable certainty requirement.

men in choosing their gangs. This daily selection process serves to eliminate the vast majority of the casual laborers. Since there is a huge surplus of men for the available work in this industry, there is simply no reasonable certainty that casuals as a group will attain seniority status. In fact, in 1968, the year plaintiffs Cox and Palmer obtained D-1 classification, only four percent of the casuals actually made this advancement.

Despite the fact that these two plaintiffs ultimately attained seniority status, the evidence is clear that it was by no means a reasonable certainty. Indeed, to advance to a D-1 classification from an unclassified or D classification is obviously the exception and not the rule. Thus, the foresight requirement of the "foresight—hindsight" test of the *Tilton* case was not and could not be met under the circumstances of this case. The intent of the Act was to give to returning veterans only employment rights, including advancements and promotions, that they could reasonably anticipate at the time of their induction into military service. Viewing liberally the circumstances of this case involved in the specific, realistic reemployment context of the Houston waterfront, plaintiffs simply could not have reasonably anticipated attainment of seniority status. This Court assesses defendants' actions including the 1,200 hour qualification period rule for military allowance as being consistent with the dictates and underlining policy of the Act, and, therefore, concludes that plaintiffs are not entitled to the relief requested.

The foregoing constitute the Court's Findings of Fact and Conclusions of Law. Counsel will prepare and submit an appropriate judgment within twenty (20) days incorporating these Findings of Fact and Conclusions of Law and properly assessing Court costs. The clerk will notify counsel.

DONE at Houston, Texas, this 26th day of May, 1972.

/s/ Carl O. Bue, Jr.
CARL O. BUE, JR.
United States District Judge

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SUPREME COURT, U. S.

FILED

NO. 73-657

IN THE

Supreme Court of the United States

October Term, 1973

BUDDY LLOYD COX, RONALD B. HEATON, and CHESTER W. PALMER, *Petitioners*

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1273, ET AL

OPPOSITION BY RESPONDENT, LOCAL 1273 I.L.A.
To
PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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OPPOSITION BY RESPONDENT, LOCAL 1273 I.L.A. To PETITION FOR A WRIT OF CERTIORARI To The United States Court of Appeals For The Fifth Circuit

Respondent, Local No. 1273, International Longshoremen's Association, files this, its Opposition to the granting of Writ of Certiorari.

QUEST'ONS PRESENTED

1. Whether the fact finding was correctly made that these Petitioners, as casuals in this hiring hall, did not occupy positions "other than temporary" under the Selective Service Act.

2. Whether the fact finding was correctly made that these Petitioners did not demonstrate the requisite "reasonable certainty" of acquiring seniority status since, before induction, in seeking each day's work they were subject to the daily exercise of managerial discretion by the various foremen in selection or rejection and in view of the limited amount of available work.

3. A third conditional issue arises in this case if the Court sustains Petitioners' position as to both questions, namely: If this Respondent's 1200-hour rule is not compatible with the Act, then among the thousands of casual employees, how and where in the line properly to be drawn for the statutory attachment of re-employment and retroactive seniority rights.

Either one of the two fact findings, if accepted, supports the judgment below.

STATEMENT OF THE FACTS

The District Court, Judge Carl Bue presiding, made extensive fact findings (4a-21a) which, together with Stipulations establish the relevant economic facts.

The available longshoreman's work for Respondent ILA Local 1273 is less than 2 million man hours per year. Under collective bargaining contract, Respondent Union furnishes men as needed to the 30 Respondent stevedore companies.

These employers are competitors of each other. Each employer orders its own gangs to load or unload ships

which it may have under contract. At any given time, a particular stevedore company may, or may not, have a ship under contract for stevedore services.

The bulk of the available man hours of work is performed by about 1,000 regular longshoremen of seniority standing which provides to each of them daily preference for selection to man available jobs through the hiring hall. These regulars are classified in seniority according to the years in which a minimum amount of work was performed, the amount being 1200 hours per year in modern years.

On some days, regular classified longshoremen claim all available jobs. On other days, excess jobs may be available for "casuals."

There is little work for the thousands of casuals. For example, in 1970, 1,686 men worked less than 400 hours each. Another 104 men worked less than 700 hours each. Altogether, these 1800 men averaged about 100 hours each and worked a total of 182,000 hours or about 1/8th of all the available man hours (1.6 million) in 1970.

In the same year, 706 regulars worked over 1200 hours each and totaled 1.2 million hours. This was 3/4ths of the available work in 1970. An additional 157 men logged between 700 and 1200 hours of work. This group performed another 1/8th of the available work.

Similar figures were presented for the year 1969. And, the irregularity of the daily demand for gangs by all stevedores was demonstrated by a tabulation of the first six months' orders in the year 1970.

So there is less than an average of 2000 hours per year of available work for the first claim of the regular

(classified) men. In general, the work which has not been preempted by these regulars has been performed by 1800 men, each of whom worked less than 700 hours each. Indeed, the work available for these men averages about 100 hours per man per year. If all the work left for casuals could be organized and compressed into a few jobs (which is impossible) only about 130 of the 1800 men could get work to the extent of 1200 hours per year (3 days per week).

In order to climb from the mass of casuals to the first step of the seniority ladder, a man must work 1200 hours in a fiscal year ending September 30. The record of the minority who did make it is this:

Year Ending September 30	Number of Men Who Attained Seniority
1964	60
1965	78
1966	120
1967	36
1968	119
1969	34
1970	34
1971	33

In this method of operation which is unique to Houston, Respondent Union maintains an open door policy for the hiring hall. On any day any person may enter for work. There is no application, acceptance, screening, or registration. The casual merely stations himself in an area of the hiring hall designated for unclassified men, and he waits.

Daily, gang foremen pick up their gangs in the order of seniority of the men who come to the hiring hall that day. Every selection of a man for a gang is for one day only. (Incidentally, these gang foremen are rotated among themselves and, so, each foreman does not always pick up a gang each day.)

When a casual is selected by a foreman, he then goes to the ship where he is placed on the single company's payroll for one day only by the timekeeper of the individual stevedore company which ordered the particular gang. The next day, the casual must return to the hiring hall to repeat the procedure of he desires more work. Each day his chance for work depends upon a variety of factors, some of which are: the number of gangs ordered by the various companies, the number of classified men who appear at the hiring hall for work, and, finally, the selection of one particular casual instead of all the others. Casuals have no seniority prefence among themselves.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The inexorable economic fact of this case is this: There is no average steady employment for the casuals even at poverty levels of income. There is no reasonable expectation, and there never has been, that sometime there will be steady work for the large number of men who come to the hiring halls.

As the District Court found, Management and the Government have exerted serious pressure upon the ILA to "de-casualize" the industry. For the sake of efficiency, it is necessary that the work be performed by regular long-

shoremen who report to work consistently and accept the jobs as offered.

Under this pressure, Respondent Union long ago adopted the 1200-hour rule for the regular work force. The purpose and effect of that rule is to force a regular longshoreman to work at least 1200 hours per year upon penalty of forfeiting one year of seniority credit if he does not do so. As the District Court noted, the Department of Labor has formally commended the responsibility accepted by the Union with its 1200-hour rule. At the very least, it must be recognized that legitimate business reason is behind the rule.

Casuals are not wanted by the industry or by the Government. There is no significant work for them. Perhaps the Union should have closed the door of the hiring hall, but in deference to its various legal obligations under both state and federal law, the union has so far adhered to the open-door policy. But whether registration is closed (as in New York State by Government action) or open as in Houston, it is still an economic necessity to absorb into the regular labor force only that number of new men which will match the available work. As in any other industry, there is no alternative to regulating the influx of new men to fit the vacancies which result from death, retirement, etc., or from economic conditions.

2. With these economics before him, the District Court came to two basic factual conclusions. First, a casual does not occupy a job which is "other than temporary" within the meaning of the statute. Second, as a matter of foreseeability or probability, casuals in the Houston hiring hall do not demonstrate a reasonable certainty of attain-

ing the first step of the seniority ladder. The District Court was guided by settled authority in both findings.

The District Court approached the task clearly mindful of the liberal construction which is appropriate to serve the basic policies of the veterans act and also the alertness which a court must employ to avoid every contrivance by contract or otherwise which will remove a large segment of an employer's men from protection of the Act. *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Dame v. C. A. Batson Co.*, 157 F. Supp. 862 (D. Mass. 1957).

3. The Court's analysis of "other than a temporary position" was dictated by clear authority as well as the weighty accumulation of circumstances.

First, the statute requires an "employer" or a "position" with an employer. True, the Union in this case has assumed liability, if any exists. The Union is a proper party defendant. *Fishgold v. Sullivan Dry Dock and Repair Corp.* Since the Union operates the hiring hall, its primary liability is a matter of fairness and the legal basis of its liability would be its agency for the various employers. However, the Union is not an employer itself and does not supply the statutorily necessary "employer" who has in his "employ" a man in a "position . . . other than a temporary position. . . ."

After a man attains the first step of the seniority ladder he has at least some contractual relationship with and some practical access to the work of the several employers on a preferential basis. But while he is still a casual, his connection with an "employer" or a "job" or a "position" is fragile, indeed. The cumulative circumstances are overwhelming:

(1.) The man is a walk-in applicant who is in no sense of the word previously screened or selected.

(2.) The walk-in does not necessarily jibe with an employer's needs or desires. The man's appearance does not fit availability of work.

(3.) There is no type of understanding between employer and employee beyond one day's work. There is no express or implied expectation that tomorrow, or ever again, the employer will have or offer work or that the employee will show up, or that he is invited to show up again. The "contract" is even more tenuous than the usual "at will" employment relationship.

(4.) A casual acquires no seniority preference over anyone, even later arriving casuals, before attainment of the first step of the seniority ladder.

(5.) A casual has no practical or customary preference over anyone, even over later arriving casuals.

(6.) There is no expectation that sufficient work will be available to enable any significant number of casuals to attain D-1 status. To the contrary, it is certain that there will not be that quantity of work available.

(7.) There is lack of nexus between a casual and any particular employer. A man's return to the same employer is uncertain.

The District Court cited and followed *Moe v. Eastern Air Lines, Inc.*, 246 F.2d 215 (C.A. 5, 1957); *United States v. Wimbish*, 154 F.2d 773 (C.A. 4, 1946); and *Brickner v. Johnson Motors*, 425 F.2d 75 (C.A. 7, 1970). These cases stand for the proposition that the controlling

determination is whether, regardless of the contract, there was a reasonable expectation that the employment would be continuous and for an indefinite time. A position is temporary when it has no preferential right to employment and no expectation of more than brief duration.

In accord is *Martin v. Roosevelt Hospital,* 426 F.2d 155 (C.A. 2, 1970), an opinion in which Judge Friendly quoted from an earlier decision by Judge Magruder of the First Circuit:

> "Judge Magruder correctly stated in Trusteed Funds, Inc. v. Dacey, supra, 160 F.2d at 418, 19 LRRM 2469, that 'The important thing is the nature of the position rather than the terms of the contract of employment . . .' He gave as instances of 'temporary' positions 'an extra clerk hired during the holiday rush' and 'a substitute employee hired during the absence of a regular employee on a year's leave,' citing Saltzman v. London Coat of Boston, Inc. Another example of a 'temporary position' would be where a man had been hired to perform a particular task such a a defined piece of research, this has been completed during his military service, and the employer does not regularly employ persons for such tasks. . . ."

In the *Brickner* case, *supra,* the Seventh Circuit following *Moe v. Eastern Air Lines, Inc.,* adopted a two-part test which first examines the the "job" and then, secondly, the employee's relationship to it. It must first be determined whether the position itself is permanent or temporary. Only if the job is permanent do we reach the matter of the employee's status within the position. There is no conflict here with *Brickner.*

After a casual attains D-1 classification, the first step on the seniority ladder, the situation changes. The man has established at least a minimal connection with reasonably steady employment. Although approximately 1000 regulars are ahead of him with first preference for the work, at least he has preference over the 1800 casuals. In that event, each employer, in effect, has made an arrangement with the Union by which all D-1 men and above will have preference for the available work of that employer. This contractual preference, plus the practical fact that the classified men correspond roughly to the manpower requirements to perform the available work of the industry, add up to a "position" which is other than "temporary." Admittedly the connection of the individual to the industry is still a little thin at this level, but the Respondent Union has recognized it as sufficient to justify the recognition of seniority accrual during military service.

But we know of no case which finds the existence of a "position other than temporary" sans contract, sans selection, sans available work, sans expectations, and sans mutual hopes or commitments of any kind. In contrast, in the probationary employee cases, there is available work for almost all probationary employees, so that the employer hires the men and the men accept the work with the mutual hope and expectation that at the other end of the line the employees will fill the employer's need for men to perform regular jobs which both understand will most probably be there for the bulk if not all of the employees. Cf. *Collins v. Weirton Steel Co.*, 398 F.2d 305 (C.A. 4, 1968).

Finally, the Union's open-door policy permits the veteran to return to the hiring hall without haggling over

any question of a statutory right to return as a casual. Thus, we are not concerned here with "reemployment" rights as such. The "other than temporary" determination, however, is a necessary predicate to the award of the retroactive seniority which was claimed in the case after the veterans did attain the first step of the seniority ladder in 1968.

4. Alternatively, the District Court held that retroactive seniority is foreclosed here by the *Tilton-McKinney* "foresight-hindsight" test developed by the Supreme Court in *Tilton v. Missouri Pacific R.R. Co.*, 376 U.S. 169 (1964), and *McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265 (1958).

The escalator principle comes into play in two situations:

First, after returning to his employer, an employee is promoted to a higher classification. He claims the seniority date in his higher classification should be retroactively adjusted to the date he would have been promoted but for his military service.

Second, a veteran returns to an apprenticeship program which he left to serve his country. Upon his return the veteran completes the apprenticeship program and then claims that his seniority date as a journeyman should be retroactively adjusted to the day he would have become a journeyman but for his military service.

There is little we can add to the District Court's discussion of *Tilton-McKinney* and the escalator principle. In these cases the Supreme Court has carefully defined the reasonable certainty of advancement which must be

discernible as a matter of foresight to justify retroactive seniority. To be sure, the Supreme Court eliminated the ordinary uncertainties of life as obstacles to finding the required reasonable certainty, including economic changes which may make the anticipated work unexpectedly unavailable, but the District Court was quite mindful of this required affirmative approach in the assessment of the probabilities of a veteran's success.

In both *Tilton* and *McKinney* the veterans were permanent employees with fixed seniority rights before induction. The question in each case, as here, was the appropriate seniority date which should be given to the returned veteran in a higher job *after* he attained or was promoted to a higher level. In *Tilton*, retroactive seniority was granted in the higher job while in *McKinney* it was denied. The difference was the existence *vel non* of the required "reasonable certainty" of advancement, taking into account the time of exercise of management discretion and the other surrounding facts. On the subject of management discretion, the court said in *Tilton* that management discretion must be exhausted before induction to satisfy the requisite foreseeable reasonable certainty. We quote from *Tilton:*

> "Properly read, therefore, McKinney holds that where advancement depends on a employer's discretionary choice not exercised prior to entry into service, a returning veteran cannot show within the reasonable certainty required by the Act that he would have enjoyed advancement simply by virtue of continuing employment during the time he was in military service."

Then, in addition to the fact that management discretion was exercised in advance in *Tilton*, the Supreme

Court stressed the following additional factors: The employer railroad suffered from a shortage of journeymen carmen mechanics called "carmen." To relieve the shortage, railroad and union provided for temporary "upgrading" of carmen helpers to do carmen's work. After 1040 hours of work as carmen, carmen helpers would be automatically considered "qualified carmen" and eligible to acquire seniority date as carmen simply by so electing in writing. After selection for "upgrading" a carman helper was entitled to carmen work ahead of other helpers who were selected for upgrading later. This fact did not escape Mr. Justice Goldberg, author of *Tilton,* a labor law specialist. This preferred contractual right to the work, plus the manpower shortage in the carman classification, overcame the theoretical contingency that carman work might not be available or that an upgraded carman helper would not be offered the required 1040 hours of qualifying work.

In making the fact finding that these Petitioners could not show reasonable certainty of attainment of seniority, the District Court was confronted with the stark facts that work is not available for the casuals as a whole, that this fact was well known in advance to all parties, that only 4 percent or less of casuals attain the first step of the seniority ladder, and that managerial discretion exercised through rotating gang foremen on a daily basis was a rigorous weeding-out process that permitted few to make the grade. Compounding the uncertainty of managerial discretion was the irregularity of available work on any given day because of the demonstrated vacillation in orders for gangs. In *Tilton,* management discretion had been exercised before induction by the selection of particular helpers for "upgrading".

In Footnote 5 the District Court made a discriminating comparison between the facts of this case and those in *Montgomery v. Southern Electric Steel Co.*, 410 F.2d 611 (C.A. 5, 1969). In short, the Court appreciated and followed the authorities, gave close attention to the probability inquiry required by escalator principle, and found himself in accord with the defendants on the factual realities of the case.

5. The District Court was not duty bound to disregard the mass of circumstances because the individual veterans maintained a certain clip up to the time of induction. In any case, the Court had evidence before him that in 1969 when 34 casuals made 1200 hours, 63 men failed although they made more than 1100 hours and another 59 men failed although they made over 1000 hours. The same was true of 1970 when 59 men who failed exceeded 1100 hours and an additional 27 exceeded 1000. (Appendix 224; 225-226):

Incidentally, this record also shows that these Petitioners' seemingly promising performance between October 1, 1965 and January, 1966 actually occurred during an 80-day Taft-Hartley injunction, a period of frantic preparations for a nationwide longshoremen's strike which did in fact materialize. During such a preparatory period, there is temporarily available work for casuals which is not available as soon as the emergency passes.

6. But if Repondent Union is mistaken, and if this Court should disagree, then we respectfully request the Court to define the proper line or factor which will better serve the purposes of the Act or to remand the case to the District Court for such determination under the guidance of this Court.

The concern which this Defendant may legitimately express to this Court is that casuals who return to the hiring hall may be awarded retroactive seniority so as to produce more classified men than the available work will support. Certainly, under *Tilton* it is required that the veteran return to complete the required work before advancement or retroactive seniority may be demanded.

The question arises, what requirement should the veteran meet in completing the required work as a basis for demanding retroactivity? Another question is, what amount of work over what period of time must the veteran have performed before induction in order to trigger the right to re-entry into the hiring hall and to achieve possible retroactive seniority?

In this connection, the Court will please be mindful of the difficulties with accepting a straight pro rata performance by the casual as a reliable test. After all, after the first day of work, the casual is far ahead on a pro rata basis of the 1200 hour requirement. Short base periods for calculations can be deceptive.

Another point which should be considered by this Court is the fact that the Respondent Union's open door policy, however odd, is very favorable for veterans. It is common knowledge that must businesses reject applicants with unfavorable draft status, partly to avoid the consequent exposure in cases of drafting. This Court should not unnecessarily push the Union and the stevedore industry to close the doors of the hiring hall. We submit there are more practical policy reasons to deny the claims here than to grant them, even viewing the matter from the side of the veterans.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DIXIE, WOLF & HALL

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Supreme Court of the United States

October Term, 1973

NO. 73-657

BUDDY LLOYD COX, RONALD B. HEATON, AND CHESTER W. PALMER,
Petitioners

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1273, ET AL.,
Respondents

BRIEF OF STEVEDORING COMPANY MEMBERS OF WEST GULF MARITIME ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The United States Court Of Appeals For The Fifth Circuit

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To The United States Court Of Appeals For The Fifth Circuit

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Respondents, Stevedoring Company Members of the West Gulf Maritime Association, file this their brief in opposition to the petition of Buddy Lloyd Cox, Ronald B.

Heaton, and Chester W. Palmer for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and would respectfully show unto the Court as follows:

QUESTIONS PRESENTED FOR REVIEW

In addition to (or in opposition to) the petitioners' view of the questions presented for review, these respondents respectfully add:

1. Whether a casual employee, who works upon a referral basis by the hour and who is paid by the hour, and who cannot identify any out of a number of employers for whom he may have worked, can lawfully be considered as having had a position "other than temporary".

2. Whether persons who are referred for employment through a hiring hall operated by a union can contend that the *classification system* used by the union in making referrals is the same as *employment* under the statute, where such system is *not* based upon actual, paid employment by any of numerous possible employers, not one of whom having been shown to have employed the person at any time.

STATEMENT OF ADDITIONAL PERTINENT FACTS

As the trial Court found,

> "In order to view in proper context the various contentions of the respective parties, it is important at this point to describe in some detail the system of allocation of work employed at the Port of Houston under which the stevedore companies employ longshoremen to load and unload vessels; it is also

> important to underscore the role played by the longshore union in this work context at the times material to this lawsuit. It is undisputed that this system is basically unique in the industry, the Court being apprised that there is no precisely parallel procedure employed in any other major American port."

Further, the Court found:

> "It is essential to recognize that under this system of employment anyone can enter the hiring hall, position himself in the section for casuals in the hall and instantly be theoretically eligible for selection to work in a gang. No employment application need be made to the union or to the stevedore companies to work in a gang. No employment application need be made to the union or to the stevedore companies to work as a casual longshoreman. In the event a casual is selected for work by a gang foreman, he then reports to the stevedore company at shipside to work the particular vessel which the stevedore has contracted to load or unload. The stevedore company may reject at shipside, and thus refuse to employ any man sent to work for them by the union where proper cause can be shown. * * *"

The stipulated facts, R. 208-210, App. 21a-23a, show that petitioner Cox was attending school until June 8, 1965, and was a minor, R. 208, App. 21a, and because of this minority he could not *rightfully* under the union agreement be referred for employment until after he had left the Army, page 36 of Plaintiff's Exhibit 2, R. 211, App. 24a, " . . . Minors not to be furnished for any class of work"; that petitioner Heaton neither before or after his service worked enough hours to secure a union classification above "casual", R. 209-210, App. 22a-23a; and that the other petitioner, Palmer (whose age and school

status does not appear), in none of the years before his service induction worked enough hours to gain a higher union classification than "casual".

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1.

No important questions of federal law are here presented for review. The hiring hall procedures and union seniority classification system are unique to the Port of Houston, i.e., apparently have no parallel in the country, and none of the three petitioners can contend under the facts that prior to their induction into the service they were other than "casual" longshoremen: Petitioner Cox was a minor, whose referral for employment was forbidden by the union-employers agreement, petitioner Heaton's hours of work before his years in the armed forces were not great and for the two-to-three years after such services were negligible, and petitioner Palmer for the three years before his entry into the service worked hours far short of those required to be classified as other than "casual".

The record is clear that, as the Courts below found, the union lowest classification as "casual" was designed to assure that only those persons who intended to follow as their regular occupation the occupation of working as longshoremen would seek referral through the union hall, that is to say, under the union classification system for employment referral the word "casual" is certainly in reality used like the word "temporary" is used in the statute.

It is respectfully submitted, further, that the attempt to use this case to extend the statutory purpose of assuring re-employment to returning servicemen, without loss of position because of armed forces service, to *hiring hall* referrals is no basis for contending the questions here are of legal and public importance: The statute in question speaks of *employment*, i.e., the relation between an employer and an employee. It is a gross mis-reading of the statute to equate *employment*, the engagement of a man by a certain employer to perform particular work, with an *occupation*. And here, where the record at best shows only that the petitioners worked for limited times at the *occupation* of longshore work, and the union classification for these men who worked only a limited number of hours was for *casuals*, fully applicable here are those cases which hold that to come within the statutory protection there must be "a reasonable expectation that the *employment* would be *continuous* and for an indefinite time". *Moe v. Eastern Airlines, Inc.*, 246 F.2d 215 (5 Cir. 1957), cert. den. 357 U.S. 936, 78 S.Ct. 1380 (1958), reh. den. 358 U.S. 858, 79 S.Ct. 13 (1958); *United States v. Wimbish*, 154 F.2d 773 (4 Cir. 1946); and *Brickner v. Johnson Motors*, 425 F.2d 75 (7 Cir. 1970).

The union classification system was clearly designed to differentiate between those who came to the hiring hall with the expectation of permanently making their livings in the occupation of longshore work, and in classifying those working only a few hours a years as "casuals", and certainly there can be no doubt that "casual" and "temporary" are words of like meaning. The fact decisions of the Courts below in substance so hold.

And of course in the decisions below the Courts expressly recognized the similarity (or identity) of *casual*

employment with *temporary* employment, and hence there is no reasonable basis for the contention that there is any conflict with decisions of other Courts of Appeal.

2.

But even if one ignores the manifest difference between *employment* and following an occupation, and employment by a company and a classification system for referral at the union-operated hiring hall, it is settled that where the holding of a position, and promotion, rests upon the exercise of discretion, a returning veteran is not entitled to assignment to a position higher than he held before departure for the armed forces. *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 375 U.S. 265, 272, 78 S.Ct. 1222, 1227 (1958). In reaching his decision, the trial Court scrupulously followed the rule of this case, finding, at 343 F.Supp. 1299-1300, that

> ". . . The selection of casuals for any work at all is a result of a daily exercise of supervisory discretion performed by numerous gang foremen throughout the year.",

stating further that numerous factors enter into the gang foreman's choices from among casuals seeking referrals, casuals whose excessive numbers require the exercise of such discretion.

Nor can there be any doubt of the correct application of the *Tilton-Missouri Pacific Railroad Company*, 376 U.S. 175, 181, 84 S.Ct. 595, 602 (1964), "foresight-hindsight" test: The Court noted that work was not available for all casuals, and it concluded that to test the expectation of seeking to follow permanently the occupation

of a longshoreman the union's classification for casuals was quite reasonable, and the Court applied carefully the *Tilton* rule to the facts of this case.

3.

Finally, no question of statutory construction is here present sufficiently important to warrant the grant of the writ here sought:

The statute in question is designed to assure a serviceman that he can return to his former *employment* without being penalized for having served his country. The statute does *not* even attempt to secure a serviceman's return upon equal terms to his former *occupation.*

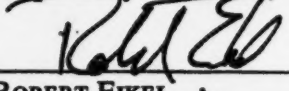
There is *no* evidence of any kind that any of the three petitioners at any time worked for any particular one of the numerous stevedoring company employers who are here respondents. The cases uniformly hold the serviceman is entitled to return on equal terms to an *employer* by whom before entering the service he was permanently employed. *Shanahan v. Atlantic Refining Co.*, 294 F.2d 360 (3 Cir. 1961); *Mouell v. Local No. 7635*, 81 F. Supp. 151 (S.D. W.Va. 1948); and *Gualtieri v. Sperry Gyroscope Co.*, 67 F.Supp. 219 (E.D. N.Y. 1946).

Here there was not the slightest proof that any of the petitioners at any time was employed by any of the numerous respondent employers. How then could the Courts below have lawfully determined by which of these respondents each or any of the petitioners were permanently employed? Obviously the decisions below, upon the evidence adduced, were therefore in all respects lawful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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